APPENDIX A.

A True Copy:

APPELLATE PART OF THE COURT OF SPECIAL SESSIONS CITY OF NEW YORK, FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK.

Docket No. 76-NY-40.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

CHARLES HUSSOCK, *Appellant*.

Before William R. Bayes, C. J., George B. De Luca, J., Max Salomon, J.

Memorandum Per Curiam.

Nov. 26, 1940.

PER CURIAM:

Appeal from judgment of the Magistrates' Court of the City of New York, Borough of Manhattan, 7th District, rendered May 20th, 1940, convicting defendant of a violation of Section 722, Sub-division 3 of the Penal Law.

The complaint charged that on March 28, 1940, at Broadway and 44th Street, New York County, defendant committed the offense of disorderly conduct in violation of the Penal Law, Section 722, Sub-division 2, for the reason that at the time and place specified defendant unlawfully and with intent to provoke a breach of the peace and whereby a breach of the peace might be occasioned, did "at about 7:45 P. M. this date while selling magazines, cause a crowd to collect, and refuse to move on when ordered by the deponent".

It is clear from the record that although the complaint specifically charged a violation of Sub-division 2 of said Section 722, the Court found defendant guilty of refusing to move on when ordered so to do by the policeman. In other words, the conviction was based upon a violation of Sub-division 3 of said Section 722, pursuant to which a person may be adjudged guilty of disorderly conduct who "congregates with others on a public street and refuses to move on when ordered by the police." It has been held that under said Section 722, it is not necessary to specify in the com-

plaint the particular Sub-division alleged to have been violated. See People *v.* Hipple, 263 NY 242. It is sufficient if the defendant be convicted of the violation of any Sub-division of said Section. In the present case defendant was charged with refusing to move on when ordered so to do and the failure to specify that this constituted a violation of Sub-division 3 of said Section is immaterial. A great deal of appellant's brief is taken up with the contention that said Section 722 as applied by the Court below is unconstitutional in that it deprives defendant of his liberty of assembly, freedom of speech and of the press and of his liberty to worship according to the dictates of his conscience. Appellant further contends that Sub-division 3 of Section 722 of the Penal Law is invalid for the reasons that it vests arbitrary and discriminatory power in the police thereby leaving the question of a violation to the whim of the police. It must be said, however, that most rights under the law are relative and must be exercised with reference to the public weal. From a reading of the record we are of the opinion that defendant was properly convicted of a violation of Section 722, Sub-division 3 of the Penal Law and that the judgment should be affirmed.

[Signed.] WILLIAM R. BAYES.

APPENDIX B.

A True Copy:

APPLICATION FROM APPELLATE PART OF COURT OF SPECIAL SESSIONS, 1ST JUDICIAL DEP'T. COUNTY OF NEW YORK.

Docket No. 76-NY-40.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,*

against

CHARLES HUSSOCK, *Appellant.*

Certificate.

I, Irving Lehman, Chief Justice of the Court of Appeals of the State of New York, certify that Appellant, Charles Hussock, through his attorney Hayden Covington, after notice to the District Attorney of New York County, and

within the time and in the manner prescribed by Section 520 of the Code of Criminal Procedure, duly presented to me an application for a certificate that a question of law is involved in the above matter which ought to be reviewed by the Court of Appeals. In such application it is urged that the judgment and order of the Appellate Part of the Court of Special Sessions of the City of New York, 1st Judicial Department, County of New York, made and entered on the 26th day of November, 1940, affirming the judgment of conviction of appellant by City Magistrate William Klapp upon the charge of violating Section 722 subdivision 2 of the Penal Law of the State of New York, is contrary to the United States Constitution, Fourteenth Amendment, Section 1, because such statute as construed and applied deprived appellant of his right of freedom of speech, of press and of assembly, and freedom to worship Almighty God according to dictates of his conscience, and because such statute vests a dragnet, arbitrary and discriminatory power in the police and leaves the question of violation of such statute entirely to the whim of the police and is thus vague and indefinite and void on its face and as construed and applied.

After hearing counsel, I denied the application because in my opinion no question of law was involved which should be reviewed by the Court of Appeals.

December 13th, 1940.

[Signed.] IRVING LEHMAN,
Chief Judge of the
Court of Appeals of the
State of New York.

Office - Supreme Court
JAN 23 1941
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 716

CHARLES HUSSOCK,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS E. DEWEY,
District Attorney of the County of New York, State of New York,
Counsel for Appellee.

STANLEY H. FULD,
MANUEL LEE ROBBINS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 716

CHARLES HUSSOCK,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, by their counsel of record, and moves that the appeal herein from the final judgment in favor of the appellee be dismissed or that the final judgment appealed from be affirmed.

Statement of the Case.

The appellant was convicted of disorderly conduct (Penal Law, § 722, subd. 3) in the City Magistrates' Court (Borough of Manhattan, Seventh District) and on May 20, 1940, was sentenced to pay a fine of $10 or to be imprisoned for three days. The appellant paid the fine and brought the case on appeal to the Appellate Part of the Court of Special Sessions of the City of New York. On November 26,

1940, that court unanimously affirmed the judgment. On December 13, 1940, the Honorable Irving Lehman, Chief Judge of the Court of Appeals, denied the appellant's application for leave to appeal to that court, thus rendering under the statutes of the State of New York the judgment of the Court of Special Sessions the judgment of the highest State court in which the cause could be heard and determined (Code Crim. Proc., § 520).

The appeal was allowed on January 16, 1941, by the Honorable William R. Bayes, Chief Justice of the Court of Special Sessions.

Jurisdiction.

In seeking a review of this case by appeal to the Supreme Court of the United States, the appellant has invoked Section 237 (a) of the Judicial Code [28 U. S. C. A. § 344(a)]. Under that statute this Court has jurisdiction to hear this appeal only if, in the cause ending in the judgment appealed from there was drawn into question the validity of the statute, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision, in the State court of last resort, was in favor of its validity.

The appellee respectfully submits that the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument and to preclude the jurisdiction of this Court. The character of the Federal question involved in the cause is a criterion of the Court's jurisdiction to review and, if the question is found to be unsubstantial, the Supreme Court may dismiss the appeal for that reason [*Smith* v. *New York* (1933), 292 U. S. 606; *Zucht* v. *King* (1922), 260 U. S. 174, 176-177].

Method of Review.

In passing, the appellee respectfully submits that there may be some doubt as to whether or not the appellant has

chosen the proper process by which to invoke the jurisdiction of this Court. At the trial, the sole Federal question in this cause was raised upon the appellant's motion to dismiss the complaint, made at the close of the entire case. At that time, and as part of his motion to dismiss, the appellant stated (85-86): *

> "And on the further ground that this defendant while lawfully on a public street doing a lawful act while so engaged was being deprived of his constitutional rights to do precisely what he was doing as those rights are guaranteed in the 14th Amendment of the Constitution of the United States and in the First Amendment, Article 8 of the Constitution of the State of New York wherein and whereby people are guaranteed their freedom of worship, of press, of speech."

It is obvious from the above that the appellant claimed that his rights and immunities, as guaranteed to him by the Federal Constitution, prevented the application of the State statute rather than that the State statute, if so applied, would be invalid as repugnant to the Federal Constitution. Since the Federal question was originally raised in that form, it may be that any further review by this Court must be by certiorari rather than by appeal [28 U. S. C. A. § 344; Judicial Code, § 237 (a), as amended by the Act of February 13, 1925 (43 Stat. 936, 937); *Citizens National Bank* v. *Durr* (1921), 257 U. S. 99, 106-107; *Dahnke-Walker Co.* v. *Bondurant* (1921), 257 U. S. 282].

State Statute Involved.

This cause involves subdivision 3 of section 722 of the Penal Law of the State of New York, the statute under which the appellant was prosecuted and upon which the

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* References are to pages in the Stenographer's Minutes of the proceedings in the Magistrates' Court.

Court of Special Sessions affirmed his conviction. The statute reads:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * * * * * *
>
> "3. Congregates with others on a public street and refuses to move on when ordered by the police. * * *."

In its opinion affirming the judgment, the Court of Special Sessions noted the appellant's claims that his conviction under this statute deprived him "of his liberty of assembly, freedom of speech and of the press, and of his liberty to worship according to the dictates of his conscience." The opinion went on to state that the appellant also contended that the statute was invalid "for the reason that it vests arbitrary and discriminatory power in the police." The court sustained the conviction, however, on the statement that the record of the proceedings in the Magistrates' Court clearly established that the defendant was properly convicted under the statute and that "most rights under the law are relative and must be exercised with reference to the public weal."

The Motion to Dismiss the Appeal, or in the Alternative to Affirm.

Both motions are predicated on the ground that the questions upon which the decision of this cause depends are so unsubstantial as to be devoid of merit, to require no further argument, and specifically foreclosed by the decisions of this Court. The appellee respectfully submits that the authority of the State under the Federal Constitution to enact

a statute for the purpose of keeping the public streets free from disturbance and riot and punishing those who offend the provisions of the statute is beyond question.

The record of the proceedings in the Magistrates' Court reveals that in the early evening of March 23, 1940, a police officer, regulating the heavy theatre time traffic, observed the appellant, and a crowd of about 100 people standing around him, on the northeast corner of 44th Street and Broadway, New York City (4-5, 11, 15), which is, as the officer testified, "one of the busiest corners in the world" (15). The appellant had a placard (People's Exhibit 1) and some literature (People's Exhibits 2, 3) with him and was haranguing the passing throng with remarks reviling organized religion (6, 7-9). Walking over to the corner, the officer attempted to disperse the crowd (11, 16). When his efforts failed, he approached Hussock and inquired whether the latter had "a public worship card" issued by the Police Commissioner (11). The appellant produced instead some sort of identification card (Defendant's Exhibit A) indicating that he was a member of the sect of "Jehovah's Witnesses" and which, he claimed, gave him the right to speak on the street (11-2, 20, 47). Warning Hussock that he must "move on" if he had no permit, the officer stepped away momentarily to give the appellant an opportunity to comply with his order (12-3). The latter, however, remained where he was and renewed his harangue about organized religion (13, 27-8). A moment or two later, the appellant not having moved on, the officer returned and placed him under arrest (13).

A member of the crowd, standing about the appellant, and who had been disturbed by the defendant's derogatory comments about organized religion, had been heckling the appellant (23-4, 28-9, 33-4). This witness also disclosed that the appellant had ignored the officer's command to

"move on" and had continued his activities after the officer momentarily stepped away (27). When the officer returned to the corner, the witness overheard him tell the defendant (28):

> "I told you to move on and now I will have to place you under arrest."

Hussock, testifying in his own behalf, claimed that he was on the street corner preaching and distributing literature in accordance with the teaching of his faith (45-8, 84). He admitted, however, that a crowd of about 75 persons had gathered about him but he claimed that the presence of this crowd was solely attributable to the person heckling him (79-81). He denied that the officer had given him any direction to "move on" (84).

In adjudging that the appellant was guilty of a violation of the statute, the magistrate pointed out that police officers were vested with the duty of preventing disorder on the public streets (92-3). Both appellant's counsel and the court agreed that no point "about a license" was raised (97-8) and the court specifically noted that "Free speech is not involved here" (98). Then, in announcing his decision, the court stated the issue as follows (98):

> "We are concerned with the conduct of the defendant [Hussock] and the words he used and whether a crowd had gathered there by virtue of his words, and [with] the order of the officer to move on."

In passing, we note that the appellant's application for leave to appeal to the Court of Appeals from the judgment of the Appellate Part of Special Sessions was denied by the Honorable Irving Lehman, Chief Judge of the Court of Appeals and we suggest that the denial was undoubtedly prompted by the settled law of this State. [*People* v. *Galpern* (1932) 259 N. Y. 279, 283-285; see *People* v. *Hipple*

(1934) 263 N. Y. 242, 243-244; *People* v. *Nixon* (1928) 248 N. Y. 182, 186, 188-189; see, also, *City of Tacoma* v. *Roe* (1937) 190 Wash. 444, 68 Pac. (2d) 1028; *State* v. *Sugarman* (1914) 126 Minn. 364, 148 N. W. 466.] Thus, in *People* v. *Galpern, supra,* 259 N. Y. 279, where the defendant, like the appellant herein, was prosecuted under section 722, subdivision 3, following his failure to obey a police officer's order to "move on," the Court of Appeals, in upholding the conviction, wrote (pp. 284-285):

> "Even if we should find that the police officer's interference was unnecessary and in the circumstances ill-advised, we could not find that it was unauthorized. * * * Friends may congregate on the sidewalk in an orderly group for a short conversation, without creating disorder or unduly offending or obstructing others, but they must 'move on' when a police officer so directs for the purpose of avoiding possible disorder which otherwise might ensue. The Legislature has provided that failure to obey such direction in itself is disorderly conduct. That provision tends to preserve public order on the streets of a great city. A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order."

We respectfully call the Court's attention to the fact that the magistrate's determination in the present case was based upon *People* v. *Galpern, supra,* 259 N. Y. 279, 284-285, and other decisions (92-3).

Throughout the State courts, the appellant argued that his conduct was privileged by his constitutional rights of freedom of press, freedom of speech, freedom of worship, and freedom of assembly, as guaranteed by section 1 of the Fourteenth Amendment of the Constitution of the United States. The appellee recognizes that section 1 of the Fourteenth Amendment of the Constitution of the United States

guarantees those freedoms and liberty to the individual and protects them from arbitrary and unwarranted abridgment by a State. It is axiomatic, however, and well recognized by the decisions of this Court, that the exercise of those individual liberties cannot be carried to a point where they interfere with preservation of law and order in a community and thus hamper and impede the liberty and freedom of others.

The argument of the appellant in the Court of Special Sessions, and to this Court, relies heavily on the decisions of this Court which have held invalid local ordinances requiring a permit or some preliminary permission for the distribution of pamphlets, house to house canvassing or street corner gatherings. [*Schneider* v. *State* (1939), 308 U. S. 147, 160; *Cantwell* v. *State* (1940), 310 U. S. 296, 305-307; *Hague* v. *C. I. O.* (1939), 307 U. S. 496, 515-516; *Lovell* v. *Griffin* (1937), 303 U. S. 444.] No such questions are presented in the case at bar. However, these very decisions clearly sanction the right of a State to enact a statute for the purpose of maintaining order on the public streets and punishing those who refuse to keep the peace. In the opinions in these cases, this Court has consistently indicated that the individual cannot pursue his constitutional rights to a point where a public disturbance, tumult, or congestion of the highways is likely to ensue. Perhaps, the clearest indication of this rule is demonstrated by the opinion of this Court in the case of *Schneider* v. *State, supra,* 308 U. S. 147, 160. There, this Court pointed out:

> "For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet;

> nor does the guarantee of the freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

In *Cantwell* v. *State of Connecticut, supra,* 310 U. S. 296, the petitioner was convicted of the common-law crime of incitement to riot and also of violating a State statute which required all persons to obtain the approval of a State officer in advance of any solicitation for religious or charitable causes. This Court held that the statute was unconstitutional since it permitted some sort of preliminary censorship of religious or charitable beliefs and thus violated the constitutional rights guaranteed by the Fourteenth Amendment (at pp. 305-307). Conviction under the common-law count was also reversed because it did not appear from the evidence that the defendant's conduct involved any breach of the peace (at pp. 309-310). This Court, however, went on to state that had the defendant "impeded traffic," his constitutional liberties would have afforded him no shield from prosecution (at p. 309).

That the appellant's contentions are fruitless and of little significance, is also manifested by the opinion of this Court in *Hague* v. *C. I. O., supra,* 307 U. S. 496. There, although the State statute in question was declared unconstitutional as involving a preliminary censorship, this Court pointed out that constitutional rights (pp. 515-516)

> "may be regulated in the interest of all * * * and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order * * *."

It is apparent, therefore, that the Federal question the appellant seeks to bring to the consideration of this Court

is wholly unsubstantial and one which has already been foreclosed by the previous decisions of this Court. The appellee, consequently, respectfully requests that the appeal be dismissed or, in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

THOMAS E. DEWEY,
District Attorney,
New York County.

STANLEY H. FULD,
Assistant District Attorney,
MANUEL LEE ROBBINS,
Deputy Assistant District Attorney,
Of Counsel.

January, 1941.

Service of a copy of the within Statement Opposing Jurisdiction and Motion to Dismiss or Affirm is hereby admitted this 25th day of January, 1941.

HAYDEN COVINGTON,
Attorney for Appellant.